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In The

**Supreme Court of the United States**

October Term, 1983

\_\_\_\_\_  
No.  
\_\_\_\_\_

TED S. HUDSON, Officer,

*Petitioner,*

v.

RUSSELL THOMAS PALMER, JR.,

*Respondent.*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
JUDGMENT OF THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT**

\_\_\_\_\_  
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\_\_\_\_\_

### **QUESTIONS PRESENTED**

1. Does a prisoner have a reasonable expectation of privacy, pursuant to the Fourth Amendment, in his cell in a prison context so as to be entitled to damages for a search conducted for security purposes?

2. If the Fourth Amendment provides no reasonable expectation of privacy, may such an expectation be found in the general terms of the Fourteenth Amendment?

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TED S. HUDSON, Officer,

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**PETITION FOR WRIT OF CERTIORARI TO THE  
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**OPINIONS BELOW**

The opinion of the United States District Court is unreported and is included herein as Appendix A. The opinion of the Court of Appeals from which the certiorari is sought is as yet unreported and is included as Appendix B.

**JURISDICTION**

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 6, 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### STATEMENT OF THE CASE

On September 16, 1981, the plaintiff's cell at the Bland Correctional Center was subjected to a shakedown search for contraband by prison authorities. The plaintiff alleged in his *pro se* suit filed on September 28, 1981, in the United States District Court for the Western District of Virginia, that during the course of this search certain of his property was destroyed in an effort to harass him. Plaintiff further alleged that the shakedown search was not routine and was planned and carried out as a form of harassment.

Plaintiff also alleged that on September 17, 1981, he was again harassed by the defendant and suffered disciplinary action as a result of Correctional Officer Hudson's placement of a false charge against him.

By an Order of November 17, 1981, the District Court accepted as true the plaintiff's allegations and found that they did not rise to the level of a constitutional deprivation.

The Court of Appeals held that the District Court's entering summary judgment for Defendant Hudson was premature because inmate Palmer had a limited privacy right from arbitrary and oppressive invasions of personal security. Unless, the Court of Appeals opined, prison officials could show that the search was done pursuant to an established program of conducting random searches of single cells or groups of cells reasonably designed to deter or discover the possession of contraband or prison officials could show that a reasonable basis existed for the beliefs that the prisoner possessed contraband, the search was an impermissible intrusion on the prisoner's privacy rights.

**ARGUMENT FOR GRANTING  
WRIT OF CERTIORARI**

**I.**

**The Fourth Amendment Does Not Apply To A Search Of A  
Prisoner's Cell By Prison Authorities.**

The paramount interests of prison security and internal order vitiate any reasonable expectation of privacy a prisoner may have so as to make the Fourth Amendment inapplicable in a prison setting. The question of whether a prisoner has Fourth Amendment rights in a prison setting was expressly left open by this Court in *United States v. Edwards*, 415 U.S. 800, 808 n.9 (1974). The Court stated in that case: "We thus have no occasion to express a view concerning those circumstances surrounding custodial searches incident to incarceration which 'violates dictates of reason either because of their number or their manner of perpetration'."

However, in *United States v. Robinson*, 414 U.S. 218 (1973) Mr. Justice Powell stated, in his concurring opinion:

"The Fourth Amendment safeguards the right of 'the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .' There are ideas of an individual's life about which he entertains legitimate expectations of privacy. I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interests in the privacy of his person. Under this view a custodial arrest is a significant intrusion of state power into the privacy of one's person. If the arrest is lawful, the privacy interests guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern."

In *Bell v. Wolfish*, 441 U.S. 520 (1979) although the Court expressly refused to address the question of whether

prisoners possessed any privacy rights, in considering the scope of the opinion, it is clear that the Court did not consider the Fourth Amendment as one of the constitutional rights retained by prisoners. On two separate occasions in the opinion, this Court refused to acknowledge that inmates retained any Fourth Amendment rights when it could have easily done so. 441 U.S. at 556, 558. The Court merely assumed the applicability of the Fourth Amendment *arguendo* for purposes of the case. Furthermore, in its opinion, the Court upheld the most intrusive type of searches, *i.e.* anal and genital inspections, without any showing that such a search would prove fruitful.

*Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974) is often cited for the proposition that, as a general rule, prisoners should be accorded those constitutional rights which are not inimical to prison administration or security. The Court noted that prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments, that they retain the right of access to the Courts, and are protected under the Equal Protection clause of the Fourteenth Amendment from invidious discrimination based on race. However, the Court further reiterates that the fact that prisoners retain rights under the due process clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. The Court further notes that in *Wolff* due process rights attached to the prisoners because the state itself had provided a statutory scheme for good conduct credit time and also specified that it was only to be forfeited for serious misbehavior. Under these circumstances this Court found that the state having created the right and recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner

had a real interest so as to be sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances to ensure that the state created right was not arbitrarily abrogated.

The Court went on to note that there must be some mutual accommodation between institutional needs and objectives in the provisions of the constitution that are of general application. It is, thus, submitted that the real significance of *Wolff* appears when it is read in conjunction with *Bell v. Wolfish*, which clarifies the proposition that Fourth Amendment rights are, in the language of *Wolff*, inimical to prison administration or security.

In the matter of the existence of the Fourth Amendment rights in a prison context, the language of *Bell v. Wolfish* is informative because it clearly indicates that prison administrators must be given great latitude in preserving internal order and discipline and in maintaining institutional security. Mr. Justice Rehnquist specifically notes that although *Wolff v. McDonnell* indicates that "there is no iron curtain drawn between the Constitution and the prisons of this country", *Wolff v. McDonnell* at 555-556, simply because prison inmates retain *certain* constitutional rights does not mean that these rights are not subject to restrictions and limitations. (Emphasis added.) Mr. Justice Rehnquist further notes that "lawful incarceration brings about the necessary *withdrawal* or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." (Emphasis added.) 441 U.S. at 545, 546. He further indicates that maintaining institutional security and preserving order and discipline are essential goals that may require limitation or *retraction* of the retained constitutional rights of both convicted prisoners and pretrial

detainees. Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Prison administrators, therefore, should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Citing *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 at 129 (1977), Mr. Justice Rehnquist noted that this Court has held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in light of the central objective of prison administration, safeguarding institutional security.

A further reason for granting certiorari in the instant case is that the number of courts which have had occasion to consider whether an inmate retained any Fourth Amendment rights in a prison context are hopelessly split. Those courts finding that some minimal Fourth Amendment rights persist in prison are represented by *United States v. Hinckley*, 672 F.2d 115, 129-32 (D.C. Cir. 1982); *United States v. Lilly*, 576 F.2d 1240, 1244-47 (5th Cir. 1978); *United States v. Stumes*, 549 F.2d 831, 32 (8th Cir. 1977); and *Bonner v. Coughlin*, 517 F.2d 1311, 1315-17 (7th Cir. 1975), *aff'd on rehearing*, 545 F.2d 565 (1976) (en Banc), *cert. denied*, 435 U.S. 932 (1978). Examples of courts finding that an inmate retains no Fourth Amendment rights are *United States v. Hitchcock*, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *Christman v. Skinner*, 468 F.2d 723 (2nd Cir. 1972); *Gettleman v. Werner*, 377 F.Supp. 445 (D.R.I. 1974); *Hoitt v. Vitek*,

361 F.Supp. 1238 (1973); *Robinson v. State*, 312 S.2d 15 (Miss. 1975), *State v. Brotherton*, 465 P. 2d 749 (Ore. App. 1970); and *Marrero v. Commonwealth*, 222 Va. 754, 284 S.E.2d 811 (1981).

An examination of the *Marrero* case is particularly informative because it is in direct conflict with the opinion of the Fourth Circuit Court of Appeals and supports the Commonwealth's position. In *Marrero* the plaintiff alleged that drugs were seized in a constitutionally impermissible search of his prison locker. There was no testimony that prison officials suspected that the plaintiff had marijuana in his locker, or that they considered him a "troublemaker" or a security risk. The only explanation for the search was that a prison official had ordered it. The plaintiff contended, further, that prison officials were required to show some legitimate, articulable need for the search and that the absence of justification for the search rendered the search unreasonable and, therefore, the evidence obtained from it inadmissible.

In responding to the plaintiff's contentions, the Supreme Court of Virginia, citing *Bell v. Wolfish*, *supra*, noted that while this Court did not explicitly hold that prisoners forfeit their Fourth Amendment rights, it recognized that these rights are basically inconsistent with the close and constant monitoring of inmates necessary to preserve an institution's security. The Virginia Supreme Court noted that prisons are not absolutely secure, and no one method of searching can eliminate the possession of contraband by prisoners and the security danger it presents. The court went on to hold:

"For one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation. Random

searches of inmates, individually or collectively, and their cells and lockers are valid and necessary to ensure the security of the institution and the safety of the inmates and all others within its boundaries. This type of search allows prison officers flexibility and prevents inmates from anticipating, and thereby thwarting, a search for contraband. Such searches may be conducted by prison authorities without notice, and in the absence of probable cause or specific information that contraband is present. Marrero's locker afforded him a right of privacy in relation to other inmates, but not as to prison security officers."

It is apparent that in Virginia a direct conflict exists between the Fourth Circuit Court of Appeals and the Virginia Supreme Court on the issue of what privacy interests an inmate has in his cell, and Virginia prison officials have been placed in the untenable position of being given no guidance on the appropriate standard of conduct in carrying out their duties.

The confusion among both state and federal courts as to the applicability of the Fourth Amendment in the prison context must be resolved by this Court because continued uncertainty by prison administrators of the parameters of their authority to conduct searches leads to inaction and could create a potentially dangerous security problem in prisons throughout the country.

It is submitted that a prisoner's retention of Fourth Amendment rights is inherently inconsistent with the correctional process in that the prisoner must be monitored as closely as possible to ensure that he is complying with the security needs of the institution. To apply the Fourth Amendment, even on a diminished scope, in a prison setting, will ultimately cause a collision with legitimate security interests. It is submitted that *Bell v. Wolfish* indicates that

in those circumstances the paramount interest of prison security should control and the Fourth Amendment must be deemed to not apply in the prison context.

As further support for the proposition that the Fourth Amendment does not obtain in the prison context, in *Lanza v. New York*, 370 U.S. 139 (1962) this Court made it clear that a public jail is not equivalent to a person's home for Fourth Amendment purposes. In *Lanza* the Court upheld the surreptitious electronic interception of a jail inmate's conversation with his brother. In addressing the Fourth Amendment question the Court said:

"But to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection . . . yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day." *Id.* at 143.

While it is true that protected areas is a concept which *Katz v. United States*, 389 U.S. 347 (1967) rejects, as recently as in the case of *Bell v. Wolfish*, 441 U.S. at 556 (1979), this Court stated that it could "well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person." As one legal commentator views it, the decision in *Bell v. Wolfish* puts an end to any doubt

about the practical impact of the Fourth Amendment inside prison walls and rejects the view that an inmate retains a limited Fourth Amendment right behind bars. Ringel, *Search & Seizures, Arrests and Confessions*, § 17.4 (2d ed. 1980).

It is submitted that *Katz* is not inconsistent with the holding of *Lanza* because *Katz* requires there be a reasonable expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." See *Katz v. United States*, 389 U.S. at 361. It is submitted that as previously indicated, this Court recognized in *Bell v. Wolfish* that the maintenance of prison security and internal order and discipline are so essential in a prison setting that achieving these goals may require not only limitations on the constitutional rights of convicted felons, but the withdrawal of the rights of pretrial detainees who retain the presumption of innocence. Surely given this view of the court, it cannot be said that the retention of Fourth Amendment rights by prisoners can be said to be an expectation which this Court could find that society is prepared to recognize as reasonable under *Katz*.

Still another reason for the granting of certiorari is the misapplication of this Court's holding in *Bell v. Wolfish* by the Court of Appeals. The Fourth Circuit Court of Appeals has confused the operation of the exclusionary rule with the existence of Fourth Amendment rights in prisoners. It is submitted that those cases holding that the Fourth Amendment is applicable in the prison context when closely examined are founded on cases such as *Stroud v. United States*, 251 U.S. 15 (1919); *Savedge v. United States*, 482 F.2d 1371 (9th Cir. 1973) *cert. denied*, 415 U.S. 932 (1974) and *Daugherty v. Harris*, 476 F.2d 292 (10th Cir. 1973). These cases all involve the application of the ex-

clusionary rule to the fruits of a search allegedly conducted in violation of the Fourth Amendment. These cases, it is submitted, do not stand for the proposition that such a violation in a prison context amounts to a violation of constitutional rights pursuant to 42 U.S.C. § 1983 entitling the plaintiff to damages.

In *Stroud*, as an example, certain letters were offered in evidence at the plaintiff's trial which contained expressions tending to establish his guilt. These letters were written while the accused was an inmate at the Penitentiary at Leavenworth, Kansas, they were voluntarily written, and under the practice and procedure in effect at the time were turned over to the warden who furnished them to the District Attorney. Although the accused requested a return of these letters on the grounds that they were tainted by their seizure and should be excluded at the accused's trial, under the circumstances of the *Stroud* case, it was held that the letters were admissible evidence and not the product of an unreasonable search or seizure. Consequently, the *Stroud* line of cases merely stands for the proposition that the exclusionary rule could be applied to evidence seized from a prisoner's jail cell. This, however, is quite a different proposition than the one found by the Fourth Circuit that the plaintiff in such a seizure has a cause of action for damages.

In *Daugherty v. Harris*, *supra*, the Court specifically held that the "known cause" comparable to that required for a search warrant in private life is not a condition precedent to the conducting of a prison search. *Daugherty* concludes that such a result would be completely unrealistic in light of the fact that it is usually the totally unexpected that disrupts prison security. It is, therefore, submitted that contrary to the premise of the Fourth Circuit that prisoners have a limited privacy interest and should be free from unreason-

able searches and unjustifiable confiscations, the foundation for the cases cited by the Court of Appeals is merely the principle that where faced with a criminal prosecution as a result of evidence seized from a cell, the exclusionary rule might be applicable to prisoners. As noted in *Bell v. Wolfish*, a constitutional protection such as the application of the exclusionary rule to potential criminal liability by an inmate is not inconsistent with the withdrawal of a specific constitutional guarantee when weighed against the interest in maintaining order and security.

## II.

### **An Expectation Of Privacy Cannot Be Found In The General Terms Of The Fourteenth Amendment.**

In its opinion in the instant case, the Fourth Circuit Court of Appeals states that it is the primary purpose of the Fourth and Fourteenth Amendments to protect individuals from arbitrary and oppressive invasions of personal security. However, the Court attempts to distinguish *Parratt v. Taylor*, 451 U.S. 527 (1981), on the grounds that in the instant case it is the substantive right to privacy and not a right to procedural due process which is in question. This, however, ignores the fact that *Katz v. United States*, *supra*, specifically holds that the Fourth Amendment cannot be translated into a general constitutional "right to privacy." The amendment protects individual privacy against certain kinds of governmental intrusions, but its protection goes further and often has nothing to do with privacy at all. In fact, *Katz* notes that "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life,

left largely to the law of the individual states." (389 U.S. at 350-1).

It is, therefore, submitted that there is no right to privacy under the Fourth Amendment. Consequently, it is submitted that since this is the case, the Fourth Circuit Court of Appeals' interjection of the Fourteenth Amendment into the instant case is inapposite, and its conclusion that *Parratt v. Taylor* "does not trench upon the right to a § 1983 remedy for an unreasonable search" is erroneous. This result obtains because absent a Fourth Amendment right to privacy, the only remaining right alleged to have been violated in the instant case is plaintiff's Fourteenth Amendment right to be free from harassment. As has been noted in *Parratt, supra*, where there is available an adequate post-deprivation remedy, there is no denial of procedural due process. In the instant case it is submitted that plaintiff's alleged need for relief from harassment does not dictate the annihilation of the delicate balance between security and a prisoner's rights in the prison context. The need for protection from harassment, further, does not create an expectation of privacy in a prison search, with all its dire security implications, because the protection may be obtained by suing directly under the common law of Virginia or the Virginia Tort Claims Act as embodied in §§ 8.01-195.1 *et seq.* of the Code of Virginia. It is noted that in *Paul v. Davis*, 424 U.S. 693 (1976), this Court held that the mere fact that a legally cognizable injury is inflicted by a state official acting under color of state law does not establish a violation of the Fourteenth Amendment so as to authorize a claim pursuant to 42 U.S.C. § 1983. The due process clause of the Fourteenth Amendment does not extend to a person the right to be free from injury wherever the state may be characterized as a tortfeasor. This Court went on

to note that federal civil rights statutes do not constitute a body of general federal tort law. Certainly, it is submitted, "harassment" can be given equal dignity in state court as well as federal court in an action for defamation or libel.

It is further noted that as this Court stated in *Paul v. Davis* "the personal right of privacy must be limited to those rights which are fundamental or implicit in the concept of ordered liberty as described in *Palko v. Connecticut*, 302 U.S. 319 (1937)." It is submitted, therefore, that where the specific language of the Fourth Amendment does not establish a right to privacy on the part of inmates, the general language of the Fourteenth Amendment cannot be construed to create such a right.

#### CONCLUSION

For the reasons stated above, the petitioner respectfully prays that this Court will grant his Petition for a Writ of Certiorari, and reverse the judgment of the court below.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I, Alan Katz, Assistant Attorney General of Virginia, of counsel for petitioner, and a member of the Bar of the

Supreme Court of the United States, do hereby certify that on the 5th day of April, 1983, I mailed 3 copies of the foregoing Petition For Writ of Certiorari to Deborah C. Wyatt, Esquire, 917 East Jefferson Street, Charlottesville, Virginia 22901, and to Russell T. Palmer, Bland Correctional Center, Route 2, Box 111, Bland, Virginia 24315-9616.

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ALAN KATZ

*Assistant Attorney General*

## APPENDIX

**APPENDIX A**

**IN THE  
UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

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Civil Action No. 81-0290-A

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**RUSSELL T. PALMER, JR.,**

*Plaintiff,*

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**v.**

**TED S. HUDSON,**

*Defendant.*

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**ORDER**

In accordance with the Memorandum Opinion entered this day, it is ADJUDGED and ORDERED that defendant motion for summary judgment be, and hereby is, granted and that this case be stricken from the docket of the court.

The Clerk of Court is directed to send certified copies of this Order to plaintiff and counsel of record for the defendant.

ENTER: This 17th day of November, 1981.

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/s/ TED DALTON  
U.S. District Judge

App. 2

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION

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Civil Action No. 81-0290-A

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RUSSELL T. PALMER, JR.,

*Plaintiff,*

---

v.

TED S. HUDSON,

*Defendant.*

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BY: Ted Dalton  
U.S. District Judge

**MEMORANDUM OPINION**

Russell T. Palmer, Jr., an inmate of the Bland Correctional Center, brings this action *pro se* under 42 U.S.C. § 1983 alleging that the defendant, Ted S. Hudson, an officer at Bland, has deprived him of his constitutional rights. He alleges that Hudson:

- 1) Destroyed certain of his non-contraband, personal property;
- 2) Brought a false charge against him before the prison disciplinary committee; and
- 3) Has engaged in a pattern of harassment against him, as evidenced by the first two allegations.

Defendant Hudson denies these allegations and has filed a motion for summary judgment accompanied by his affidavit. Advised of his right to respond, plaintiff has filed a further pleading, reiterating his claims, and affidavits from two of his fellow inmates supporting his version of the facts. As the factual allegations are now fully developed, the court finds it timely to adjudge the merits of defendant's motion for summary judgment. Although this case is replete with factual disputes, none is crucial to the application of the relevant law. Accordingly, as plaintiff has failed as a matter of law to state a claim cognizable under § 1983, the defendant's motion for summary judgment will be granted.

The essential facts underlying this dispute are as follows: On September 16, 1981, defendant Hudson conducted a shakedown of plaintiff's locker, in the course of which plaintiff claims that Hudson, apart from leaving his locker in disarray, destroyed certain personal, non-contraband property. During the shakedown, Hudson discovered in a trash can near plaintiff's bunk a pillow case that had been ripped open and the cotton contents removed. Hudson then placed a charge against plaintiff of "destroying, altering or damaging State property". A hearing was held on this charge on September 24, 1981 and plaintiff was found guilty. A written reprimand was entered in his inmate record and he was ordered to make restitution for the cost of the pillowcase.

Plaintiff claims that Hudson's action in destroying his personal property has deprived him of property without due process of law in contravention of his fourteenth amendment rights. This issue has been recently addressed by the Supreme Court in *Parratt v. Taylor*, . . . U.S. . . . , 101 S.Ct. 1908 (1981). Under the holding in that case, this

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court is forced to conclude that plaintiff has failed to state a claim of deprivation of property without due process of law such as would be cognizable in an action under § 1983. In *Parratt* a prisoner alleged that a prison official had negligently lost a certain item of his property. He sued under § 1983 for the value of the property, alleging that he had been deprived of property without due process of law. Initially, the Supreme Court noted that in any action under § 1983 two elements are essential: 1) action by a person acting under color of state law resulting in 2) a deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States. In *Parratt*, as in this case, the right claimed was the fourteenth amendment right not to be deprived of property "without due process of law". The Court held, however, that where the state provides the plaintiff with a remedy to redress his loss that satisfies the requirements of due process, then the plaintiff cannot be said to have been deprived of his property "without due process of law".

"We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment."

*Parratt v. Taylor*, .... U.S. ...., ...., 101 S.Ct. 1908, 1916 (1981), quoting from *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), mod. en banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978). The Court in *Parratt* concluded that the existence of a state statutory tort remedy allowing inmates to recover against state officials for negligent loss of property satisfied the requirements

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of due process. Similarly, the court in this case must conclude that the tort remedies available to the plaintiff in the Virginia courts, which plaintiff is advised to pursue to compensate for the loss he alleges has occurred, satisfies due process.

Plaintiff has alleged an intentional destruction of his property by defendant Hudson. Where the tort is intentional, the defendant employee of the state would enjoy no immunity under Virginia law. *Elder v. Holland* 208 Va. 15, 155 S.E.2d 369 (1967). Accordingly, plaintiff may proceed against the defendant in state court either for conversion, *see generally* 19 *Michie's Jurisprudence*, "Trover and Conversion," § 4 (1977), or for detinue, *see* Va. Code §§ 8.01-144 *et seq.* (Repl. Vol. 1977). As these remedies provide plaintiff with a "meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities," *Parratt, supra*, 101 S.Ct. at 1917, he has not alleged that he has been deprived of his property without due process of law. Therefore his allegation fails to state a claim cognizable under § 1983.

Plaintiff's second claim is that defendant Hudson brought a false charge against him before the prison's disciplinary committee. The affidavits of plaintiff's fellow inmates substantiate his claim that the prison disciplinary decision was wrong and that, at the very least, there was a substantial question whether the pillow cover found in the trash can near his bunk was in fact his. Nevertheless, it is now well-settled that federal courts do not sit as a further stage of appeal or a board of review to determine the accuracy of facts determined at a prison disciplinary hearing. *Flythe v. Davis*, 407 F. Supp. 137, 138 (W.D. Va. 1976). The role of this court is to determine, rather, that the prisoner was afforded the protections of procedural due process in his

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adjustment committee hearing. *Russell v. Division of Corrections*, 392 F. Supp. 476, 477 (W.D. Va. 1975). In this case it appears that plaintiff was given full benefit of those procedures mandated by *Wolff v. McDonnell*, 418 U.S. 539 (1974). He was served with notice of the charges against him, was given an opportunity to seek advice from an attorney or an inmate or staff adviser, was present at the hearing and was afforded the opportunity of presenting witnesses and evidence on his behalf. These procedures, established pursuant to published guidelines of the Virginia Department of Corrections, fully comported with the requirements of *Wolff*. Indeed, plaintiff makes no allegation that they did not. He claims, however, that the hearing panel disregarded his clear proofs in favor of supporting a fellow officer's false charge. This claim, however, goes to the very merits of the charge which this court, in deference to the procedures established by the state, cannot review. Accordingly, this claim also fails to state a cause of action cognizable under § 1983.

Plaintiff's final claim is that he is being subjected to harassment on the part of defendant Hudson. He points to the two preceding allegations as supportive of this claim and also to numerous other shakedowns which he has experienced at the hands of Officer Hudson. Plaintiff also alleges that he was called into the office once late at night. While there is no doubt that in extreme cases of harassment and improper treatment a claim of cruel and unusual punishment proscribed by the sixth amendment may be stated, see, e.g., *Landam v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973), the court does not feel that the allegations made in this case, even if taken as true, rise to the level of a constitutional deprivation. It has long been recognized that courts "possess no expertise in the conduct and manage-

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ment of correctional institutions". *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 200 (8th Cir. 1974).

Courts are accordingly limited in their exercise of power in this area to deprivations which represent constitutional abuses and they cannot prohibit a given condition or treatment in prison management unless it reaches the level of an unconstitutional deprivation. It has been well said that "[C]ourts encounter numerous cases in which the acts or conditions under attack are clearly undesirable and are condemned by penologists, but the courts are powerless to act because the practices are not so abusive as to violate a constitutional right." Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 72 *Va.L.Rev.* 841, 843 (1971).

*Sweet v. South Carolina Dep't of Corrections*, 529 F.2d 854, 859 (4th Cir. 1975). This court is willing to accept as true the plaintiff's allegations concerning "harassment" by defendant Hudson. As the court has already noted, however, Virginia state law provides plaintiff an adequate forum to pursue his claim that Hudson has intentionally destroyed his personal property. Concerning the "false charge" lodged against him by Hudson, the court is powerless to review the merits of this claim, as explained above. Finally, this court stands ready to correct any abuse of plaintiff that rises to the level of a deprivation of a constitutional right. But the allegations of "harassment" contained in this complaint simply do not, singly or in the aggregate, amount to a matter of constitutional significance. Accordingly, the court finds that plaintiff, in this regard also, has failed to state a claim under § 1983.

For the reasons set forth above, defendant's motion for

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summary judgment is granted. An appropriate order will be entered.

ENTER: This 17 day of November, 1981.

/s/ TED DALTON

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Ted Dalton  
U.S. District Judge

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**APPENDIX B**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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No. 81-6967

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RUSSELL THOMAS PALMER, JR.,

*Appellant,*

v.

TED S. HUDSON, Officer,

*Appellee.*

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Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Ted Dalton, Senior District Judge.

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Argued October 5, 1982

Decided January 6, 1983

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Before WINTER, Chief Judge, PHILLIPS and MURNA-  
GHAN, Circuit Judges.

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Deborah C. Wyatt (Wyatt & Rosenfield on brief) for Appellant; Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia on brief) for the Appellee.

WINTER, Chief Judge.

Russell T. Palmer, Jr., an inmate of the Bland Correctional Center in Virginia, brought this § 1983 action against Ted S. Hudson, an officer of that facility, alleging, among other things, that Officer Hudson destroyed his property, in a non-routine shakedown search.<sup>1</sup> The district court granted defendant's motion for summary judgment, reasoning that under *Parratt v. Taylor*, 451 U.S. 527 (1981), the intentional destruction of a prisoner's property is not a violation of due process, when the prisoner has an adequate remedy under state law. The district court also ruled that, accepting Palmer's allegations of harassment as true, it could not conclude that the allegations were of constitutional significance. We agree that under *Parratt* due process is not violated when a state official intentionally deprives an individual of his property by a random and unauthorized act if the state provides an adequate postdeprivation remedy. However, we reverse and remand for further proceedings on Palmer's claim that the alleged nonroutine shakedown of his property by Officer Hudson was an unconstitutional search in violation of his Fourteenth Amendment right to privacy.

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<sup>1</sup> Palmer's other claims are without merit and may be disposed of summarily. The district judge properly reasoned that defendant's actions do not constitute cruel and unusual punishment and that the procedures accorded to Palmer in the disciplinary proceedings suffice under the standard of *Wolff v. McDonnell*, 418 U.S. 539 (1974). The claim that defendant destroyed legal materials during the search of his locker, and so infringed his right of access to the courts, is meritless since there is no indication that Officer Hudson's acts were in retaliation for Palmer's legal activities, *cf.* *Russell v. Oliver*, 552 F.2d 115 (4 Cir. 1977), nor any indication that other avenues for seeking legal relief were unavailable to Palmer. *Cf.* *Williams v. Leake*, 584 F.2d 1336 (4 Cir. 1978).

## A.

In *Parratt* the Supreme Court held that the negligent loss of a prisoner's property by a prison official was not a due process violation when the state provided an adequate post-deprivation remedy. *Parratt's* scope cannot easily be limited to negligent deprivations of property. For, if the underlying principle is, as Justice Rehnquist stated in a plurality opinion, that when no practical way to provide a predeprivation hearing exists, a postdeprivation hearing will satisfy the dictates of procedural due process, then it as well applies to an intentional deprivation for which meaningful prior review was impractical. *Accord* *Engblom v. Carey*, 677 F.2d 957 (2 Cir. 1982); *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1352 (9 Cir. 1981), *cert. granted*, sub nom *Rutledge v. Kush*, 50 U.S.L.W. 3862 (1982).<sup>2</sup>

<sup>2</sup> See also *Gilday v. Boone*, 657 F.2d 1, 2 n.1 (1 Cir. 1981); *Waterstreet v. Central State Hospital*, 533 F. Supp. 274 (W.D. Va. 1982); *Sheppard v. Moore*, 514 F.S. 1372 (M.D.N.C. 1981). Several courts have stated that *Parratt* should not extend to intentional acts. *Weiss v. Lehman*, 676 F.2d 1320, 23 (9 Cir. 1982); *Yusuf Asad Madyun v. Thompson*, 657 F.2d 868, 873 (7 Cir. 1981); *Schiller v. Strangis*, 540 F. Supp. 605 (D. Mass. 1982); *Howse v. DeBarry Correctional Inst.*, 537 F. Supp. 1177 (M.D. Tenn. 1982); *McCowen v. City of Evanston*, 534 F. Supp. 243, 49 (N.D. Ill. 1982); *Peters v. Township of Hopewell*, 534 F. Supp. 1324 (D. N.J. 1982); *Tarkowski v. Hoogason*, 532 F. Supp. 791, 794-95 (N.D. Ill. 1982); *Parker v. Rockefeller*, 521 F. Supp. 1013, 16 (N.D. W. Va. 1981).

A common argument for so limiting *Parratt* is that extending its scope to intentional acts drastically undercuts the use of § 1983 as a check on wrongdoing by state officials, its congressionally intended purpose. *Howse v. DeBarry Correctional Inst.*, *supra*; *Tarkowski v. Hoogason*, *supra*; *Parker v. Rockefeller*, *supra*. However, § 1983 is not a remedy for every wrong committed by state officials, it is only a remedy for those wrongs which are of a constitutional dimension or which violate a federal statute. *Parratt*, of course, did not restrict the availability of § 1983 as a remedy for constitutional wrongs. Instead, it held the constitutional requirement of procedural due process to be satisfied if the state provides a post facto remedy for

Nor do we read any of the separate opinions in *Parratt* to give any persuasive basis on which to conclude that its holding does not encompass an intentional tort. It is true that four justices stated that they would limit *Parratt's* scope to negligent acts, but no persuasive rationale was provided for doing so. Justice Blackmun, with whom Justice White concurred, agreed with the plurality that the impracticality of predeprivation review and the existence of a postdeprivation remedy was relevant to determining if an action violated due process. However, he suggested that the existence of a state tort remedy should not suffice to cure the unconstitutional nature of a state official's intentional act, since an intentional act would rarely be amenable to prior review and since a state tribunal would be unlikely to provide due process when reviewing the deliberate conduct of the state's employees. 451 U.S. at 545-546. Neither rationale for limiting *Parratt's* scope obtains here for there is no practical mechanism by which Virginia could prevent its guards from conducting personal vendettas against prisoners other than by punishing them after the fact, nor have we been given any cause to believe that Virginia courts would be less diligent in protecting prisoners from intentionally inflicted injuries than in protecting them from negligently inflicted injuries.

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an injury inflicted by an official which was not done pursuant to an established policy and was not amenable to prior control. *Parratt* does not impinge upon the right to a § 1983 remedy for an officially inflicted injury done pursuant to an established procedure, which remains a violation of the requirement of procedural due process, *Logan v. Zimmerman Brush Co.*, 50 U.S.L.W. 4247, 4251 (Feb. 23, 1982), or for an official act which violates a substantive constitutional right, such as the right to vote, *Duncan v. Poythress*, 657 F.2d 691, 704-5 (5 Cir. 1981), or for an official act which is sufficiently due process, *Schiller v. Strangis*, 540 F. Supp. 605, 613-15 (D. Mass. egregious to amount to a violation of the requirement of substantive 1982).

Justice Marshall intimated that he would limit *Parratt's* scope to negligent deprivations, but he, too, suggested no rationale for the distinction that he was prepared to recognize. 451 U.S. at 555. Justice Powell would limit *Parratt* to nonintentional takings by making intent an essential element of a due process claim on the theory that "deprivation" as used in § 1983 "connotes an intentional act . . . or, at the very least, a deliberate decision not to act to prevent a loss." 451 U.S. at 547-548. However, every other member of the court agreed that a negligent deprivation of property was a due process violation, and that the proper inquiry was whether a postdeprivation remedy could cure the constitutional wrong. As we state above, once it is assumed that a postdeprivation remedy can cure an unintentional but negligent act causing injury, inflicted by a state agent which is unamenable to prior review, then that principle applies as well to random and unauthorized intentional acts.

We therefore conclude that plaintiff has no meritorious cause of action under § 1983 for the allegedly intentional destruction of his property.

#### B.

We conclude, however, that the district court's entering summary judgment for defendant with regard to an unreasonable search of his property was premature. In his verified complaint plaintiff alleged that "officer Hudson shook down my locker and destroyed . . . my property . . . as a means of harassment. . . . The shakedown was no routine shakedown. It was planned and carried out only as harassment." In moving for summary judgment, defendant filed his affidavit asserting that he and Officer Lephew conducted "a routine search of [plaintiff's] locker" and that "it was merely a routine search for contraband." Plaintiff responded with a

counteraffidavit reasserting that he "knows and believes that the shakedown of Sept. 16, 1981 was not a routine shake-down, but only a form of harassment by [defendant]."

Thus the record reflects a sharp factual conflict as to whether the search was routine or whether it was conducted solely for purposes of harassment. Summary judgment was therefore precluded, Rule 56 F.R. Civ. P., unless it can be concluded that Palmer had no privacy interest in the locker. While we have never considered this issue, numerous other courts have held that prisoners have a limited privacy interest and should be free from unreasonable searches and unjustifiable confiscations.<sup>3</sup> *United States v. Hinckley*, 672 F.2d 115, 129-32 (D.C. Cir. 1982); *United States v. Lilly*, 576 F.2d 1240, 1244-47 (5 Cir. 1978); *United States v. Stumes*, 549 F.2d 831, 32 (8 Cir. 1977); *Sostre v. Preiser*, 519 F.2d 763, 764-65 (2 Cir. 1975); *Bonner v. Coughlin*, 517 F.2d 1311, 1315-17 (7 Cir. 1975), *aff'd on rehearing*, 545 F.2d 565 (1976) (in banc), *cert. denied*, 435 U.S. 932 (1978). *United States v. Savage*, 482 F.2d 1371, 1372 (9 Cir. 1973); *Daughtery v. Harris*, 476 F.2d 292, 294 (10 Cir.), *cert. denied*, 414 U.S. 872 (1973). *But see United*

<sup>3</sup> In *Lanza v. New York*, 370 U.S. 138, 142-43 (1962), the Court intimated that Fourth Amendment protections would not extend to a prison cell. The continuing validity of this reasoning is doubtful, for in *Katz v. United States*, 389 U.S. 347 (1967), the Court rejected the "constitutionally protected area" test upon which the *Lanza* dicta was based. In *United States v. Edwards*, 415 U.S. 800, 808 n.9 (1974), the Court expressly left open the question whether prisoners possessed privacy rights. In *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974), it stated that, as a general rule, prisoners should be accorded those constitutional rights which are not inimical to prison administration or security. In *Bell v. Wolfish*, 441 U.S. 520, 555-60 (1979), the Court again expressly refused to address the question of whether prisoners possessed any privacy rights, merely holding that whatever rights they retained were limited, and not violated by cell block shakedowns, or body cavity searches conducted after prisoner contact with outsiders.

*States v. Hitchcock*, 467 F.2d 1107 (9 Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

In defining privacy rights in prison we are guided by the general principle that prisoners should be stripped of only those constitutional rights which would impair prison security or administration. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). However, this is not to say that prisoners have the same privacy interests as those not in prison. Because of the legitimate demands of prison security, and to a lesser extent a prisoner's diminished expectation of privacy,<sup>4</sup> neither a warrant nor probable cause is a prerequisite to a search or seizure in prison. *See, e.g., United States v. Lilly*, 576 F.2d at 1244; *United States v. Stumes*, 549 F.2d at 832; *Bonner v. Coughlin*, 517 F.2d at 1317. Irregular, unannounced shakedown searches of prisoner property are permissible, for they are an effective means of ensuring that prisoners do not possess contraband. *Bell v. Wolfish*, 441 U.S. 520, 555-57 (1979); *Olson v. Kleeker*, 642 F.2d 1115 (8 Cir. 1981). Shakedown searches of single individuals are troubling, however, for there is an ever present danger that the search was motivated by a guard's personal desire to harass or humiliate the inmate, and not by legitimate institutional concerns. *See Wayne R. Lafave*, 3 *Search & Seizure* § 10.9 (1978). Needless to say, a primary purpose of the Fourth and Fourteenth Amendments is to protect individuals from such arbitrary and oppressive invasions of personal security. *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979).

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<sup>4</sup> Denying prisoner privacy rights merely because of the absence of an expectation of privacy is circular reasoning. Prisoners will come to expect that level of privacy which is accorded to them. Giannelli & Gilligan "Prison Searches and Seizures: 'Locking' The Fourth Amendment Out of Correctional Facilities", 62 Va. L. Rev. 1045, 1058-63 (1976).

But individual shakedown searches, such as that here, may legitimately be grounded upon either a prison policy of conducting random searches of single cells or blocks of cells to deter or discover the possession of contraband, or upon the existence of some reasonable basis for a belief that the prisoner possesses contraband. We recognize that allowing the prison authorities to adopt a program of random individual searches may provide an increased opportunity for prison officials to abuse that power and utilize searches as a means of harassment; however, the device is of such obvious utility in achieving the goal of prison security that we do not think that the risk outweighs the benefit.<sup>8</sup> Prisoners will be accorded some protection from abusive searches by requiring prison authorities, if the validity of the search is questioned, to prove that adequate grounds existed to justify the search. Cf. *United States v. Lilly*, 576 F.2d at 1245. When the search is a shakedown of a particular prisoner's property, this may be done in one of two ways: either by proving that the search was done pursuant to an established program of conducting random searches of single cells or groups of cells reasonably designed to deter or discover the possession of contraband, cf. *United States v. Ready*, 574 F.2d 1009, 1014 (10 Cir. 1978) (search permissible without specific cause when done pursuant to routine reasonably designed to promote institutional security); or, by proving that some reasonable basis existed for the belief that the prisoner possessed contraband. In assessing the validity of a proffered justification for a search, a court should, of

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<sup>8</sup> Some justification for an absolute prohibition of individual shakedown searches can be found in *Delaware v. Prouse*, *supra*, where the Supreme Court invalidated a state program of conducting random spot checks of automobiles, in part because of the inherent danger of arbitrary conduct by the police, despite the admitted utility of such a practice.

course, consider direct proof offered by the plaintiff that the search was impermissibly motivated, by a desire to harass or humiliate him, such as evidence of other acts of harassment by the defendant.

If the defendant is unable to establish that the search was permissibly motivated and conducted in a reasonable manner, then the plaintiff is entitled to at least nominal damages. In an appropriate case where his injury is greater, he may be entitled to both actual and punitive damages. *See* *United States v. Calandra*, 414 U.S. 338, 354 n.10 (1974); *Baskin v. Parker*, 588 F.2d 965 (5 Cir. 1979); *O'Connor v. Keller*, 510 F. Supp. 1359 (D. Md. 1981). *Parratt v. Taylor* does not trench upon the right to a § 1983 remedy for an unreasonable search, for the right violated is the substantive right to privacy and not a right to procedural due process. *See* *Parratt v. Taylor*, 451 U.S. at 534-6 [distinguishing *Monroe v. Pape*, 365 U.S. 167 (1961)].

Because we conclude that Palmer had a limited privacy right which may have been violated, we reverse the district court's judgment as to this claim and remand for an evidentiary determination.

AFFIRMED IN PART,  
REVERSED IN PART AND  
REMANDED.